

**Before the  
Federal Communications Commission  
Washington, D.C. 20554**

In the Matter of	)	
	)	
Amendment of Section 73.202(b),	)	
Table of Allotments,	)	MB Docket No. 00-53
FM Broadcast Stations.	)	RM-10479
(Eldorado, Mason, Mertzon and Fort Stockton,	)	RM-10770
Texas)	)	
	)	
	)	

**MEMORANDUM OPINION AND ORDER**  
(Proceeding Terminated)

**Adopted: January 10, 2007**

**Released: January 12, 2007**

By the Assistant Chief, Audio Division, Media Bureau:

1. The Audio Division has before it a Petition for Reconsideration filed by Bryan A. King, successor to BK Radio ("BK Radio") directed to the *Report and Order* in this proceeding.<sup>1</sup> For the reasons discussed below, we deny the Petition for Reconsideration.

2. **Background.** At the request of Katherine Pyeatt, the *Notice of Proposed Rule Making* proposed the allotment of Channel 241A to Eldorado, Texas, as a fourth local service.<sup>2</sup> In response to the *Notice*, BK Radio, former licensee of Station KOTY, Channel 239C2, Mason, Texas, filed a Counterproposal. In that Counterproposal, BK Radio proposed the substitution of Channel 240C2 for Channel 239C2 at Mason, reallocation of Channel 240C2 to Mertzon, Texas, and modification of the Station KOTY license to specify operation on Channel 240C2 at Mertzon. BK Radio filed its request pursuant to Section 1.420(i) of the Commission's Rules which permits the modification of a station authorization to specify a new community of license.<sup>3</sup> Under *Community of License*, we are required to determine whether the proposed change in community of license will result in a preferential arrangement of allotments. In determining whether a proposal would result in a preferential arrangement of allotments, we compare the existing versus the proposed arrangement of allotments using the FM allotment priorities set forth in *Revision of FM Assignment Policies and Procedures*.<sup>4</sup> In this situation, the proposed reallocation would provide a second local service to Mertzon and a net gain in service to 82,844 persons.

<sup>1</sup> *Eldorado, Mason, Mertzon and Fort Stockton, Texas*, Report and Order, 21 FCC Rcd 3572 (MMB 2006).

<sup>2</sup> *Eldorado, Texas*, Notice of Proposed Rule Making, 17 FCC Rcd 12824 (MB 2002).

<sup>3</sup> See *Modification of FM and Television Authorizations to Specify a New Community of License* ("Community of License"), 4 FCC Rcd 4870 (1989); *recon. granted in part*, 5 FCC Rcd 7094 (1990).

<sup>4</sup> *Revision of FM Assignment Policies and Procedures*, Second Report and Order, 90 FCC 2d 88 (1988). The FM allotment priorities are: (1) First fulltime aural service; (2) Second fulltime aural service; (3) First local service; and (4) Other public interest matters. Co-equal weight is given to Priorities (2) and (3).

3. In the *Report and Order*, we determined that the BK Radio Counterproposal would not result in a preferential arrangement of allotments as required by *Community of License* and denied the proposed reallocation.<sup>5</sup> In taking this action, we noted that the reallocation of Channel 240C2 from Mason to Mertzon would create a loss area of 8,650 square kilometers with a population of 14,156 persons. Within this population, 7,372 persons would lose one of two reception services which was fatal to this Counterproposal. We recognized that there were vacant channels that would eventually serve this “gray” area. However, consistent with *Pacific Broadcasting of Missouri, LLC (“Refugio”)* and *Sells, Arizona*, we stated that vacant allotments cannot be used to avoid the loss of either a first or second reception service.<sup>6</sup>

4. In its Petition for Reconsideration, BK Radio argues that in determining underserved areas, such as areas with only one reception service, we should include potential service from vacant allotments and not just actual service. As such, BK Radio contends that the *Report and Order* was in conflict with the Commission decision in *Greenup, Kentucky, and Athens, Ohio*.<sup>7</sup> In addition to the vacant allotment that would serve the gray area resulting from the reallocation of Station KOTY, BK Radio states that the *Report and Order* did not address the fact that there are now three construction permits that would serve a “significant” portion of this area.<sup>8</sup> In a separate vein, BK Radio argues that extending the *Refugio* policy regarding vacant allotments to this case involving gray area “violates tenants of basic administrative procedure” in that this change in policy did not afford the public notice or an opportunity to comment. Finally, BK Radio notes that its reallocation proposal would provide a first reception service to 124 persons. According to BK Radio, this is not *de minimis* and should justify favorable action on its proposal.

5. **Discussion.** We deny the Petition for Reconsideration. At the outset, our determination that the proposed reallocation would create gray area containing 7,372 persons was not inconsistent with the Commission decision in *Greenup, Kentucky* which stated that vacant allotments are considered in determining service. In considering a reallocation proposal under *Community of License*, we compare the existing allotment against the proposed allotment to determine whether the reallocation will result in a preferential arrangement of allotments under the guidelines set forth in *Revision of FM Assignment Policies and Procedures*. These guidelines are normally used in comparing competing FM proposals and the respective needs for a proposed new service. Consistent with *Greenup, Kentucky*, vacant allotments are considered in making this comparison. However, in *Community of License*, the Commission specifically stated that it would be “particularly hesitant” to deprive an area of an existing first or second reception service.<sup>9</sup> Subsequently, the Commission stated that the public has a legitimate expectation that existing service will continue, and this expectation is a factor that must be weighed independently against the public interest benefit resulting from a proposed reallocation regardless of whether the service removed is a local service or a reception service.<sup>10</sup> The Commission also stated that a vacant allotment or an unbuilt construction permit is a “poor substitute” and does not adequately cure the disruption in service.<sup>11</sup> In this situation, a second local service to Mertzon and a net service gain in service, which are

<sup>5</sup> At the request of Katherine Pyeatt, the *Report and Order* also dismissed the proposal for a Channel 241A allotment at Eldorado, Texas.

<sup>6</sup> *Pacific Broadcasting of Missouri, LLC (“Refugio”)*, Memorandum Opinion and Order, 18 FCC Rcd 2291 (2003), *recon. denied*, Memorandum Opinion and Order, 19 FCC Rcd 10950 (2004); *Sells, Arizona*, Report and Order, 19 FCC Rcd 22459 (MB 2004), *recon. pending*.

<sup>7</sup> *Greenup, Kentucky, and Athens, Ohio*, Memorandum Opinion and Order, 6 FCC Rcd 1493 (1991).

<sup>8</sup> Mason, Texas, (BNPH-20060309AAT); Leakey, Texas, (BNPH-20060308AIQ); and Hunt, Texas, (BNPH-20060309AAU).

<sup>9</sup> *Community of License*, Report and Order, 4 FCC Rcd at 4874.

<sup>10</sup> *Community of License*, Memorandum Opinion and Order, 5 FCC Rcd at 7097.

<sup>11</sup> *Id.* at 7097.

considered under FM Allotment Priority 4, do not outweigh the loss of an existing second reception service to a substantial number of persons.<sup>12</sup> In addition to the disruption in service, we note that a second reception service is a Priority 2 consideration.

6. We reject the argument that our action in this proceeding constituted an unlawful retroactive rule making. First of all, as stated above, the Commission has specifically discussed the loss of existing first and second service and the public's legitimate expectation that these services will continue. As such, the *Report and Order* did not reverse existing law or apply a new law retroactively to pending cases involving different parties. Instead, we merely applied a Commission change in processing policy. We recognize that in the past, we have routinely processed rulemaking proposals involving a loss of a sole local service or service to underserved areas when a vacant allotment or proposed allotment would eventually serve this area. Such actions were conditioned on the commencement of service by the vacant allotment. In *Refugio*, the Commission ceased this practice with respect to the removal of a sole local service. In doing so, the Commission stated that delays in licensing vacant allotments and in commencement of service for potentially significant periods of time have resulted in a burden on Commission resources and have lead to spectrum entanglements. In *Sells, Arizona*, we extended this processing policy to proposals involving the loss of a sole reception service. In this regard, we note that *Refugio* involved the loss of a sole local service which is considered under FM Allotment Priority 3 and *Sells, Arizona*, involved the loss of a sole reception service which is considered under FM Allotment Priority 1. In this proceeding, we are merely adhering to this policy with respect to a proposal involving the loss of a second reception service which is considered under FM Allotment Priority 2.

7. We also reject BK Radio's related contention that the change in processing policy constitutes an unlawful retroactive rule making because it upsets the expectation that current rules and policies will be followed. We are not required to follow a policy or procedure that has been determined not to be in the public interest.<sup>13</sup> As discussed above, the Commission in *Refugio* determined that the public interest is not served by the practice in which licensees may rely on vacant allotments to backfill the loss of an existing service occasioned by a reallocation.<sup>14</sup> The Commission also stated that it would apply this revised policy to pending cases. It is well settled that a filer does not have a vested right in the Commission's continued application of processing policies in effect at the time of the filing.<sup>15</sup> Thus, BK Radio had no cognizable expectation interest that its proposal would be considered under *pre-Refugio* policies.<sup>16</sup>

8. Finally, it continues to be our view that a first service to 124 persons is *de minimis* and does not justify favorable action on the BK Radio proposal. In *Seabrook, Huntsville, Bryan, Victoria, Kennedy and George West, Texas*, the Commission determined that in comparing competing upgrade proposals, a second aural service to 455 persons was *de minimis* and not entitled to dispositive consideration.<sup>17</sup> Instead, consistent with prior cases, we granted upgrade proposal serving a significantly larger number of persons. In affirming this action, the Commission observed that the issue of whether a population is *de*

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<sup>12</sup> Even if we were to consider outstanding construction permits, the construction permits referenced in this proceeding would eventually serve only 2,975 of the 7,372 persons losing a second reception service.

<sup>13</sup> *Washington Association for Television and Children v. FCC*, 665 F. 2d 1264, 1268 (D.C. Cir. 1981).

<sup>14</sup> *Cf. Yakima Valley Cablevision, Inc. v. FCC*, 794 F.2d 737 (D.C. Cir. 1986) (requires an affirmative finding that a new policy should be applied to a pending request).

<sup>15</sup> *Chadmore Communications, Inc. v. FCC*, 113 F.3d 235 (D.C. Cir. 1997).

<sup>16</sup> *See Community Television, Inc. v. FCC*, 216 F.3d 1133, 1143 (D.C. Cir. 2000) (rejecting retroactivity argument with regard to applications which were subjected to licensing standards introduced after applications were filed).

<sup>17</sup> *Seabrook, Huntsville, Bryan, Victoria, Kennedy and George West, Texas* ("Seabrook"), Memorandum Opinion and Order, 10 FCC Rcd 9360 (1995).

*minimis* pertains to all four of the FM Allotment Priorities. The Commission also stated that the issue of whether a particular number is *de minimis* relates to the total number of persons that would be affected by the rulemaking proceeding and, in any event, it would not afford a decisional significance to a *de minimis* number of persons if it were to lead to an anomalous result or otherwise circumvent a public interest consideration. In this instance, 7,372 persons losing a second reception service is significant and would be contrary to the public interest. We will not withdraw an existing second reception service to 7,372 persons on the basis of a potential first reception service to a *de minimis* number of persons.

9. The cases cited by BK Radio do not justify reversing this result. In each of these cases, a *de minimis* number of persons losing or gaining either a first or second aural service was not of decisional significance sufficient to override a significant public interest consideration or Commission policy. In *Cheyenne, Wyoming, and Gering, Nebraska*, we granted a new allotment at Cheyenne, Wyoming and denied a competing request for an upgrade at Pine Bluffs, Nebraska.<sup>18</sup> In doing so, we recognized that the proposed upgrade would provide a second aural service to 581 persons. However, this population total was insufficient to rebut the Commission policy that a new primary service is preferred over the upgrade of an existing service. In addition, we also noted that a downgrade necessary to accommodate the Pine Bluffs upgrade would result in 211 persons losing a potential first reception service. As stated in that case, the loss of a first aural service to 211 persons, of itself, counterbalanced the gain in a second reception service to 581 persons. In *Silverton and Bayfield, Colorado*, we upgraded an allotment and reallocated Channel 296C to Bayfield as a first local service.<sup>19</sup> This reallocation resulted in 46 persons losing their only reception service and 457 persons losing their second reception service. These *de minimis* service losses did not outweigh the significant public interest benefit of a first local service to Bayfield with a population of 1,090 persons. We also noted that the losses in service would be offset by a first reception service to 121 persons and a second reception service to 2,541 persons. In *LaMesa and Tahoka, Texas*, we reallocated Channel 262C1 from LaMesa to Tahoka, Texas, and modified the Station KIOL license to specify Tahoka as the community of license.<sup>20</sup> This resulted in a substantial gain in the number of persons receiving service and Tahoka having its first competitive FM service. This reallocation also resulted in 328 persons receiving a first reception service and 1,338 persons receiving a second reception service. That proposal would have been granted regardless of these gains in first and second reception service. As such, these gains were not of decisional significance.

10. Accordingly, IT IS ORDERED, That the aforementioned Petition for Reconsideration filed by Bryan A. King, successor to BK Radio IS DENIED.

11. IT IS FURTHER ORDERED, That this proceeding IS TERMINATED.

12. For further information concerning this proceeding, contact Robert Hayne, Media Bureau, (202) 418-2177.

#### FEDERAL COMMUNICATIONS COMMISSION

John A. Karousos  
Assistant Chief, Audio Division  
Media Bureau

<sup>18</sup> *Cheyenne, Wyoming, and Gering, Nebraska*, Report and Order, 15 FCC Rcd 7528 (MMB 2000).

<sup>19</sup> *Silverton and Bayfield, Colorado*, Report and Order, 14 FCC Rcd 21502 (MMB 1999).

<sup>20</sup> *LaMesa and Tahoka, Texas*, Report and Order, 10 FCC Rcd 11018 (MMB 1995).